FILE COPY

SUPREME COURT, U. S.
FILED
JAN. 2 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939

No. 44

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

HAROLD S. DEMING,
Counsel for Respondent,
80 Broad Street,
New York, N. Y.

DONALD HAVENS,
BERNARD D. ATWOOD,
Of Counsel.

SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
THE STATUTES	2
STATEMENT OF THE CASE	2
DECISION OF THE COURT OF APPEALS	8
SUMMARY OF ARGUMENT	9
POINT I—The Court of Appeals was correct in holding that the imposition of the New York City Sales Tax as applied to the Respondent's purchases was in violation of the United States Constitution because it was "a direct tax on interstate commerce."	10
A—The sales and deliveries in question are transactions in interstate commerce	10
B—The tax is an absolutely direct burden on interstate commerce	17
POINT II—Comments on arguments in Petitioner's Brief	19
Preliminary Note	19
A—As to Point II in Petitioner's Brief	20
B—As to Point I in Petitioner's Brief	25
C—As to Point III in Petitioner's Brief	27
D—As to Point IV in Petitioner's Brief	28
E—As to Point V in Petitioner's Brief	30
F—As to the particular Brief in the case at bar	30

PAGE

POINT III—The fuel oil is not subject to the New York City Sales Tax because at all times it retained its distinctive character as an import under the protection of Article 1, Section 10, Clause 2 of the Constitution of the United States as well as that of the Commerce Clause; it never acquired a situs within the City of New York or became a part of the mass of property within the city 32

A—As to the bonded oil..... 32

B—As to the drawback oil..... 36

POINT IV—The proposed imposition of the City Sales Tax on the transfer of title and possession of the fuel oil at the moment of its discharge into the bunkers of Respondent's foreign flag vessels engaged in the carriage of passengers and merchandise to foreign ports would violate Article 1, Section 10, Clause 2 of the Constitution of the United States prohibiting State taxation of exports 40

A—The proposed taxation of the fuel oil would constitute taxation of the process of exporting the merchandise carried in Respondent's vessels 40

B—The deliveries of fuel oil in question are, themselves, "exports" within the meaning of Article 1, Section 10, Clause 2 of the Constitution 43

POINT V—Respondent is entitled on the present record to have this Court sustain the judgment of the Court below, if necessary, upon the grounds set forth in Points III and IV, *supra*..... 49

CONCLUSION 52

APPENDIX—New York City Personal Property Tax 53

TABLE OF CASES

	PAGES
Adams Manufacturing Co. *v.* Storen, 304 U. S. 307 (1938)	27
Alexander *v.* Cosden Co., 290 U. S. 484 (1934)	51
Almy *v.* California, 24 How. 169 (1860)	44
Anglo-Chilean Corp. *v.* Alabama, 288 U. S. 218 (1933)	35
Awalt *v.* United States, 47 F. (2d) 477 (C. C. A. 3, 1931)	46
Ayer & Lord Co. *v.* Kentucky, 202 U. S. 409 (1906)	5, 24
Banker Bros. *v.* Pennsylvania, 222 U. S. 210 (1911)	20
Booth Fisheries Corp. *v.* Case, 182 Wash. 392 (1935)	47
Brown *v.* Maryland, 12 Wheat. 419 (1827)	29, 33, 34, 35, 36, 37, 38, 45
Carstairs *v.* Cochran, 193 U. S. 10 (1904)	38
Clark *v.* Williard, 294 U. S. 211 (1935)	51
Clifton Mfg. Co. *v.* United States, 293 U. S. 186 (1934)	51
Commercial Credit Co. *v.* United States, 276 U. S. 226 (1928)	51
The Conqueror, 166 U. S. 110 (1897)	47
Cook *v.* Pennsylvania, 97 U. S. 566 (1878)	35
Cunard SS Co., Ltd. *v.* Mellon, 262 U. S. 100 (1923)	48
Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282 (1921)	12, 15
Dower *v.* Richards, 151 U. S. 658 (1894)	12
Eastern Air Transport *v.* Tax Commission, 285 U. S. 147 (1932)	29, 42
Egan *v.* Hart, 165 U. S. 188	12
Fairbanks *v.* United States, 181 U. S. 283 (1901)	40, 44
Federal Trade Com. *v.* Pacific Paper Assn., 273 U. S. 52 (1927)	51
Felt & Tarrant Mfg. Co. *v.* Gallagher, 306 U. S. 62 (1939)	21, 23
Frey & Son *v.* Cudahy Packing Co., 256 U. S. 208	50
Graybar Elec. Co. *v.* Curry, 308 U. S.—(Nov. 6, 1939)	20

PAGES

Gulf Fisheries Co. *v.* Darrouzet, 17 F. (2d) 374 (D. Tex. 1926) 47
Gulf Fisheries Co. *v.* MacInerney, 276 U. S. 124 (1928) 37, 47
Gwin, White & Prince, Inc. *v.* Henneford, 305 U. S. 434 (1939) 18, 27
Helvering *v.* Gowran, 302 U. S. 238 (1937) 50
Henneford *v.* Silas Mason Co., 300 U. S. 577, (1937) 6, 16, 23, 24, 25
Hump Hairpin Co. *v.* Emmerson, 258 U. S. 290 (1922) 26
Israel *v.* Arthur, 152 U. S. 355 (1894) 11
Langnes *v.* Green, 282 U. S. 531 (1931) 50, 51
Low *v.* Austin, 13 Wall. 29 (1871) 39
McNeel Marble Co. *v.* Graves, 247 App. Div. 242, aff'd 275 N. Y. 601 (1937) 20
Minnesota *v.* Blasius, 290 U. S. 1 ..... 5, 6, 25
Minnesota & St. Louis R. R. Co. *v.* Minnesota, 193 U. S. 53 (1904) 12
Morehead *v.* New York, *ex rel.* Tipaldo. 298 U. S. 587 (1936) 51
New York & Cuba Mail SS Co. *v.* United States, 125 Fed. 320 (D. N. Y. 1903), rev'd other grounds, 200 U. S. 488 (1906) 41
Norfolk & Western Railway Co. *v.* Sims, 191 U. S. 441 (1903) 35
Panhandle Oil Co. *v.* Knox, 277 U. S. 218 (1928) 29
People ex rel. Astor Trust Co. *v.* State Tax Commission, 174 App. Div. 320 (3d Dept. 1916) 5, 24
Perry *v.* United States, 39 F. (2d) 52 (C. C. A. 5, 1930) 46
Proctor & Gamble Mfg. Co. *v.* United States, 19 U. S. C. C. P. A. 415, cert. den. 287 U. S. 629 (1932) 46
Robbins *v.* Shelby Taxing District, 120 U. S. 489 (1887) .....
Sonneborn Bros. *v.* Cureton, 262 U. S. 506 (1923) 38
Southern Pacific Co. *v.* Gallagher, 306 U. S. 167 (1939) 16, 21, 22, 42

PAGES

Southern Pac. Co. *v.* Kentucky, 222 U. S. 63 (1911) 5, 24
The State Freight Tax, 15 Wall, 232 (1872) 29
Stelos Co. *v.* Hosiery Motor-Mend Corp., 295 U. S. 237 50
Swan & Finch Co. *v.* United States, 190 U. S. 143 (1903) 43
Thames & Mersey Ins. Co. *v.* United States, 237 U. S. 19 (1915) 41
United States *v.* American Railway Express Co., 265 U. S. 425 (1924) 50
United States *v.* Chavez, 228 U. S. 525 (1913) 43
United States *v.* Gully, 9 F. (2d) 959 (S. D. N. Y. 1922) 46
United States *v.* Holt State Bank, 270 U. S. 49 50
United States *v.* Hvoslef, 237 U. S. 1 (1915) 41
United States *v.* Sischo, 262 U. S. 165 (1923) 47
United States *v.* Williams, 278 U. S. 255 50
Western Live Stock *v.* Bureau of Revenue, 303 U. S. 250 (1938) 17, 27, 30
Western Union Tel. Co. *v.* Foster, 247 U. S. 105, (1918) 5, 15
Williamsburgh Power Plant Corp. *v.* City of New York, 255 A. D. 214 (2d Dept. 1938) aff'd without opin. 280 N. Y. 551 (1939) 25
Wiloil Corporation *v.* Pennsylvania, 294 U. S. 169 (1935) 5, 20
Zellerbach Co. *v.* Helvering, 293 U. S. 172 (1934) 51

OTHER AUTHORITIES

New York Local Law, No. 25 of 1935, as amended by No. 13 of 1935 (Personal Property Tax) 25, 53

United States Constitution:
Article 1, Sec. 8, Cl. 3 8
Article 1, Sec. 9, Cl. 5 ..... 41, 44
Article 1, Sec. 10, Cl. 2 ..... 9, 10, 32, 40, 41, 42, 43, 44, 45, 49

Supreme Court of the United States

OCTOBER TERM, 1939

No. 44

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the New York Court of Appeals (R. 302) is reported in 279 N. Y. 192 and its supplemental opinion on motion for reargument in 280 N. Y. 691; the opinion of the Appellate Division (R. 294) is reported in 254 App. Div. 237.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under section 237, as amended, of the Judicial Code (28 U. S. C.,

§ 344, subd. b), upon the ground that the Court of Appeals was in error in holding that the New York City Sales Tax Law, as applied to the transactions here involved, violates the constitutional rights of Respondent.

The Statutes

The Enabling Act and the local Sales Tax Law will be found in "Appendix of Statutes" submitted by Petitioner in connection with his brief. The Personal Property Tax Law will be found in Appendix B of Respondent's brief in No. 475, *McGoldrick* v. *Berwind-White Coal Mining Company;* excerpts from the Personal Property Tax Law, as amended, are printed as an appendix to this brief.

Statement of the Case

In contrast to the Petitioner's statement of facts, the Respondent directs the Court's attention to the findings of fact of the Courts below as set forth in their opinions. The paragraphs headed "Appellate Division" are taken from the opinion of the Appellate Division of the New York Supreme Court (254 App. Div. 237, 239-241; R. 294). The balance of the findings quoted below are from the opinion of the New York Court of Appeals (279 N. Y. 192, 197-198; R. 303, 304):

Appellate Division

"The petitioner, more commonly known as the French Line, is a French corporation, engaged in the transportation of passengers and freight between the

United States and foreign countries. It is authorized to do business in this State and maintains in New York City a general agency for the United States and Canada for the sale of steamship tickets, the soliciting of freight, the operation of its piers, and the purchasing of supplies for its vessels.

"The Standard Oil Company of New Jersey is a Delaware corporation. It, too, has offices in New York. Part of its business is the sale of bunker fuel and Diesel fuel oil. It has no storage tanks or other supplies located in New York City. It maintains at Bayonne, New Jersey, a large storage, refining and shipping plant. Another plant is at Bayway, New Jersey.

"Bonded Standard bunker 'C' fuel oil is refined oil stored in the tanks of the Standard Oil Company, free from the payment of any import duty to the United States, at all times under the supervision of the Customs Service. A bond to insure payment to the United States of any import duty which would become due if the oil should be used for domestic purposes is required. When delivered to a foreign steamship, a release from the bond is granted.

"'Drawback' oil is oil imported from South America and refined at Bayonne or Bayway, New Jersey, at the plants of the Standard Oil. An import duty is paid thereon, but upon exportation or delivery to foreign steamship, a refund of such duties is made. Save for a few deliveries originating at Staten Island, all deliveries were of oil of these types.

"For many years prior to the enactment of the Local Laws in question, the Standard Oil had agreements with the petitioner for the furnishing of this fuel and Diesel oil to the vessels of the petitioner at their piers in New York City. As certain vessels with a limited draft could dock at Bayonne and

there receive the oil, there was a five-cent differential placed on oil delivered in Bayonne or in New York City. It does not appear, however, that any deliveries were ever made to the petitioner in New Jersey.

"As refueling of the petitioner's vessels in this city was required to be very expeditious, because of a quick 'turn-around', the following procedure was adopted between the petitioner and the Standard Oil. The incoming liner, about forty-eight hours before arrival at the Port of New York, would radio an estimate of the bunker requirements to the petitioner's New York office. Thereupon the petitioner's employee would telephone the Standard Oil shipping clerk in New York City and place the order. It was so timed that the barges on which the oil was transported from New Jersey to the vessel would arrive ten or fifteen minutes after the vessel had completed docking. Thereupon the oil was pumped directly from the barges into the fuel bunkers.

"While the contracts between these parties did not specifically require that this oil should come from New Jersey or any other specified locality, the fact is, as already noted, that the only sources of supply for oil of this character in this vicinity controlled by the Standard Oil were its plants in Bayonne and Bayway, New Jersey. Furthermore, the petitioner knew that this would be the immediate source of the fuel oil and, of course, the petitioner had the right, specifically granted in the contracts, to fuel its vessels at Bayonne, were they of sufficiently shallow draught. Moreover, the contracts required delivery to the steamer.

"Certain small deliveries in emergency periods were made by oil borrowed by the Standard from competitors, and two of such deliveries had their origin at Staten Island in New York City, where the competing firm had its oil.

"We are of opinion that, with respect at least to the New Jersey originating deliveries mentioned, there could be assessed and collected no tax under the City Sales Tax Law.

"As to those shipments originating in New Jersey, they were interstate transactions, and hence not taxable by the State of New York. The City, deriving its power from the State, could have no greater right. Delivery from New Jersey was the 'normal, contemplated and followed course' of dealing (*Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113).

"There was here no ending of the interstate transaction, nor had the oil come to rest in this jurisdiction so as to acquire a situs herein. There was no break in transit. Under such circumstances there was an entire and exclusive interstate transaction (*Minnesota* v. *Blasius*, 290 U. S. 1).

"The oil was immediately, as already stated, pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Ayer & Lord Co.* v. *Kentucky*, 202 U. S. 409; *People ex rel. Astor Trust Co.* v. *State Tax Commission*, 174 App. Div. 320, 324.) [1]

• • • • • • • •

"Finding, as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the New

---

[1] Omitted here is the Court's discussion of certain cases including *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169 (1935), and a reference to a concession made by Respondent (the Petitioner in the Appellate Division) that as to the emergency deliveries originating at Staten Island the sales tax of $292.83 should apply. The concession was made solely for the purpose of leaving for decision in that Court in the pending *Gulf Oil Corporation* case, in which no other question was raised, the question of the taxability of bonded oil delivered from storage within the city (see p. 31, *infra*).

York City Personal Property Tax Law also did not apply (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *Minnesota* v. *Blasius*, *supra*, p. 10)."

COURT OF APPEALS

"The contract for the period in question for fuel oil is contained in a letter accepting an offer to extend a previous fuel oil contract until December 31, 1936. It states that the Standard Oil Company of New Jersey is to supply the total fuel oil requirements at New York of all the oil burning vessels of the Compagnie Generale Transatlantique during the period of the contract up to a maximum of four million barrels per year. The maximum price is fixed at $1.10 per barrel, with provision for increases. The contract for the Diesel fuel was also made at New York for a period up to December 31, 1935, not to exceed fifteen thousand barrels in any one month, and up to, but not exceeding one hundred thousand barrels during the term of one year. Delivery shall be made by barge provided by the seller to the buyer's vessel at dock within the harbor limits at New York, or to the buyer's vessel alongside dock of seller at New York. The price varies according to the place of delivery.

"These two companies have been doing business for many years, and it was well understood that the oil of the Standard Oil Company of New Jersey was stored in thousands of tanks in Bayonne, New Jersey. So far as this record shows, it had no storage facilities in New York City. As the *Normandie* or the *Paris* or the *Champlain* or the *Lafayette* approached the harbor in New York, messages were sent to the Standard Oil Company's office in New York City indicating the amount of fuel that would be necessary, and with the docking of the steamer at the steamship company's pier, barges of the oil company would soon be alongside prepared to pump the

oil into the steamer's tanks. The oil was brought from New Jersey by the oil company's barges. Both the Standard Oil Company of New Jersey and the Compagnie Generale Transatlantique were doing business in the City of New York. The latter had its piers and office at the foot of Fiftieth Street, and places of business at 19 State Street and 610 Fifth Avenue, Manhattan. The offices of the Standard Oil Company of New Jersey were at 26 Broadway, New York City.

* * * * * *

"* * * The steamship company knew that the nature of the business required oil to be stored in large quantities, and that the oil company had such a plant, and delivered its oil by drawing it off from these tanks into ships at Bayonne, or else into barges, to be carried to vessels at the Port of New York. While the purchase or the contract of sale was made in New York, *it was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey, kept there in tanks, was the thing bargained for.* So far as the record in this case goes, the contract centers around the purchase of the New Jersey oil of the kind and quantity specified. *The delivery at the Port of New York was made necessary because of the draft of the steamers.* The cost of transportation from Bayonne to the Port of New York increased the price.

* * * * * *

"Here, * * * there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose which we can treat by analogy as a manufacturing plant. *It is the articles of this plant in New Jersey which the purchaser seeks.* At the office of the seller in New York it bargains for this oil to be put in its ships. We think, under the principles stated in the

Sears, Roebuck case and the authorities there cited, *that this is a contract for interstate shipments* • • •" (Italics ours.)

Each of the above statements taken from the opinions of the Courts below finds ample support in the record; specific references will be found in the footnote.[1]

Decision of the Court of Appeals

It is upon the basis of the foregoing facts as found by the New York Courts that the Court of Appeals determined (as stated in the amended remittitur) that the attempted imposition of the tax was invalid "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, Clause 3) of the Constitution of the United States." 280 N. Y. 691. The conclusion of the Court of Appeals, as stated in the opinion, was "that this is a contract for interstate shipment, and that the tax upon such a sale is a direct tax on interstate commerce." Accordingly, the Court of Appeals affirmed a judgment for refund of the tax paid.

---

[1] Business of Respondent, R. 64, 68; location of offices of Respondent and Standard Oil Company, R. 66, 125; authorization of Respondent to do business in New York, R. 65; place of incorporation of Respondent and Standard Oil Company, R. 65, Exh. 40, R. 286 A; testimony describing "bonded" oil and "drawback" oil and the method of handling and disposing of both types, R. 188-198, 133-134; the contracts in question, Exh. Nos. 10, 13, 14, R. 236, 240, 241-242; testimony describing the method of ordering the oil prior to the arrival of the ships and the actual barging and handling of the oil, R. 121-122, 126-133; location of Standard Oil Company's tanks, R. 198, 205, 206; facts relating to delivery, R. 174-176, 133; facts relating to the bargaining for the oil in New Jersey and the course of business, R. 106, 126-143, 175, 223, 225; testimony establishing that out of 971 deliveries, 99-1/5% were from the Standard Oil Company's plant and only 4/5ths of 1% were emergency borrowings from competitors, Exh. 27, R. 257, 148, 222-225; testimony relating to emergency deliveries and establishing that 99-4/5% of the deliveries were made from New Jersey to New York and only 1/5th of 1% of the deliveries were made from within New York City or State, R. 149-150, Exh. 27, R. 257, 148, 222-225.

The determination of the Court of Appeals can (as we shall demonstrate under Points III and IV of this Brief, pp. 32 to 49, *infra*) be supported upon constitutional grounds other than that stated in the remittitur; but we shall deal first with the ground which the Court of Appeals deemed it sufficient to consider.

Summary of Argument

I—The Court of Appeals was correct in holding that the imposition of the New York City Sales Tax as applied to the Respondent's purchases was in violation of the United States Constitution because it was "a direct tax on interstate commerce."

A. The sales and deliveries in question are transactions in interstate commerce

B. The tax is an absolutely direct burden on interstate commerce

II—Comments on arguments in petitioner's brief.

III—The fuel oil is not subject to the New York City Sales Tax because at all times it retained its distinctive character as an import under the protection of Article 1, Section 10, Clause 2 of the Constitution of the United States as well as that of the Commerce Clause; it never acquired a situs within the City of New York or became a part of the mass of property within the city.

IV—The proposed imposition of the City Sales Tax on the transfer of title and possession of the fuel oil at the

moment of its discharge into the bunkers of Respondent's foreign flag vessels engaged in the carriage of passengers and merchandise to foreign ports would violate Article 1, Section 10, Clause 2 of the Constitution of the United States prohibiting State taxation of exports.

A. The proposed taxation of the fuel oil would constitute taxation of the process of exporting the merchandise carried in Respondent's vessels

B. The deliveries of fuel oil in question are, themselves, "exports" within the meaning of Article 1, Section 10, Clause 2 of the Constitution

V—Respondent is entitled on the present record to have this Court sustain the judgment of the Court below, if necessary, upon the grounds set forth in Points III and IV, *supra*.

POINT I

The Court of Appeals was correct in holding that the imposition of the New York City Sales Tax as applied to the Respondent's purchases was in violation of the United States Constitution because it was "a direct tax on interstate commerce."

A.

The Sales and Deliveries In Question Are Transactions In Interstate Commerce

The Courts below have found as facts that "While the purchase or contract of sale was made in New York, it

was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey, kept there in tanks, was the thing bargained for. * * * The delivery at the port of New York was made necessary because of the draft of the steamers. The cost of transportation from Bayonne to the port of New York increased the price. * * * Here * * * there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose * * *. It is the articles of this plant in New Jersey which the purchaser seeks. At the office of the seller in New York it bargains for this oil to be put in its ships." They found further as a fact that "Delivery from New Jersey was the 'normal, contemplated and followed course' of dealing." They found further as a fact that "There was here no ending of the interstate transaction, nor had the oil come to rest in this jurisdiction so as to acquire a situs herein. There was no break in transit."

The Petitioner now seeks to assert before this Court that "The source of shipment is a matter of complete indifference to the taxpayer." He made the same assertion before the Court of Appeals, which has found the fact to be otherwise. It is a well settled principle in this Court requiring no extended citation of cases that this Court will not interfere with the findings of fact of the Courts below unless such findings are without any substantial support in the record.

Israel v. *Arthur*, 152 U. S. 355, 362 (1894):

> "And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a Federal question

might arise if the question of fact were decided in a particular way."

This is so even where there is dissent in the Court below on the questions of fact. See *Minnesota & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53 (1904), where it was expressly held that the rule remained unchanged, although the State Supreme Court had evenly divided on the findings of fact made by the lower Court. This Court stated at pages 64-65:

> "It is well established that on error to a state court this court cannot reexamine the evidence, and when the facts are found we are concluded by such finding. *Egan* v. *Hart*, 165 U. S. 188. But in the case at bar we are met by the circumstance that the Supreme Court equally divided on the question whether the facts distinguish this case from 76 Minnesota, 469. The plaintiff in error, therefore, contends that there has been no judgment of the Supreme Court on the facts and they are open to review here. The contention is not tenable. There is no statement of facts by the Supreme Court, and its decision, though by a divided court, constituted an affirmance of the finding of the District Court.
>
> * * * * * *
>
> The finding, like the verdict of a jury, is conclusive in this court. *Dower* v. *Richards*, 151 U. S. 658."

A sharp distinction is, of course, to be drawn between findings of fact and conclusions of law. See, for example, Mr. Justice BRANDEIS' comment in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921) at 295, that the decision of that case involved two determinations: "One was of fact—whether the wheat was sold and bought for shipment to Tennessee. The other was of law—whether

the fact that the wheat was so sold and bought makes the transaction one in interstate commerce." So here: there was before the Court of Appeals first, the questions of fact as to the intent of the parties to bargain for specific oil and what was "the normal, contemplated and followed course of dealing"; and then the question of law as to whether that intent and those dealings made the transactions transactions in interstate commerce. That the consideration of the facts as facts by the Court of Appeals was careful and thorough is obvious from their sharp differentiation of the essential facts in the case at bar from those in the *Sears, Roebuck* case. There was no careless commingling of facts and law in the opinion but a clear determination of the facts before reaching a legal conclusion (upon the basis of those facts) that the transaction was one of interstate commerce upon which the proposed tax could not validly be imposed.

Under these conditions we respectfully submit that the findings of fact as to the intent of the parties and their actual course of dealing are not to be challenged in this Court but are to be accepted as the basis for the determination of the questions of law thereby presented.

In brief, then, we are dealing with long continued purchases by the Respondent Steamship Company of specific fuel oil stored in New Jersey for delivery by barge, under customs seal, to its vessels at their New York City piers, the barges (in order not to delay the quick turn-around of the vessels in their transatlantic trade) timing their arrivals to coincide as closely as possible with that of the steamers and pumping the oil directly into the fuel tanks of the steamers for consumption upon the foreign voyages about to begin.

We submit that this represents interstate commerce in its simplest form. The entire transaction was in each case in interstate commerce from the moment the oil left the storage tanks in New Jersey until title and possession passed to the Respondent absolutely synchronously with the pumping of the oil into the ship and its acquisition thereby of the situs of the ship which was, as a matter of law, France. Strictly speaking, it may even be questioned whether, as a matter of law, title and possession passed within the City of New York. Transportation is never complete until delivery and receipt, which, in this case, was at the end of a hose nozzle deep in a ship having no situs in the city. "Finding, as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted or continuous" the Appellate Division of the New York Supreme Court held that "the New York City Personal Property Tax Law also did not apply"—a holding from which the Petitioner has never appealed.

In any event, as the oil never even for an instant came to rest in the City or acquired a situs there, the tax, if imposed at all, must be imposed upon the transfer of possession which was at one and the same instant an integral and indispensable part of the transportation itself—delivery and receipt. The Petitioner seeks to refer to this transfer of title or possession as a "local" event, quite separable from the interstate transportation —as something occurring after interstate transportation had ceased. But the facts are plainly to the contrary. This oil, it may fairly be said, merely collided with and rebounded from the periphery of the City of New York in its uninterrupted and continuous journey

from New Jersey to the high seas. It has been settled by a long line of decisions of this Court that all the component parts of a transaction in interstate commerce are equally within the protection of the Commerce Clause. For example, it is said in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290 (1921): "Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and *all the component parts* of that intercourse." It is immaterial whether the transfer of title occurs at the beginning or end of the interstate movement (*Ibid.*, p. 291). A tax upon any one component part of an interstate transaction is thus just as much a burden on interstate commerce as a tax upon any other component part. Shipment, transportation, delivery and receipt at destination are all equally a part of the interstate transaction, as is also the execution of the contract calling for such a transaction. It is not, as a matter of law, even necessary that the contract shall expressly stipulate for interstate delivery if in fact such was, as in the case at bar, the "normal, contemplated and followed course" of dealings, as stated by Mr. Justice HOLMES in *Western Union* v. *Foster*, 247 U. S. 105, 113 (1918). Certainly no case can be cited to indicate that the transfer of title and possession of goods which takes place as part and parcel of the delivery thereof as the final step in an interstate transaction can be severed from that transaction, treated as a local event, thus deprived of the constitutional shield and taxed. On the contrary, local taxes, even when (for the purpose of giving them unquestionable local character) shaped as use taxes, must, this Court has indicated, be imposed upon a use not "so closely connected with delivery as to be in

substance a part thereof." "Things acquired or transported in interstate commerce," said Mr. Justice CARDOZO in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937) at page 582, "may be subjected to a property tax, non-discriminating in its operation, when they have become part of the common mass of property within the State of destination." But, the opinion states, at page 583, "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself." This statement is clearly predicated upon the premise that "the sale itself" (where, as here, title passes coincidentally with delivery at the conclusion of an interstate transaction) is not locally taxable.

In the case at bar the "unloading" was accomplished by one and the same act which constituted the transfer of title and possession, viz: the discharge of oil from a hose nozzle into the ship's bunkers. The oil in the case at bar "never acquired a situs in the city; it therefore could not "become part of the common mass of property within" the city. This, as previously noted, has been definitely decided in the case at bar, and not appealed from by the City. From this it is clear that the Petitioner concedes that there was no "taxable moment" such as that referred to by Mr. Justice REED in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939), following the passage of title and possession, during which the New York City use tax could be imposed. If this is so it is beyond dispute that the tax here sought to be imposed is a tax upon "the sale itself," in interstate commerce, which Mr. Justice CARDOZO so strongly indicated would be objectionable.

B.

The Tax Is An Absolutely Direct Burden On Interstate Commerce

Having demonstrated, as we believe, that the transaction here sought to be taxed is one of the integral parts of an interstate transaction, it scarcely seems open to contest that to tax it constitutes a burden upon such interstate commerce. The City Sales Tax Law imposes a direct tax (collectible by the City from either the purchaser or the seller) of 2% upon the gross "Receipts from Sales of Certain Properties • • • in the City of New York," the word sale to include "transfer of title or possession or both." It is impossible to conceive of a burden more direct than a gross receipts tax levied upon a sale which is effectuated as an integral and simultaneous part of an interstate delivery by the vendor to the purchaser as in the case at bar. To permit such a burden would be to reverse the long settled holdings of this Court that no direct burden upon interstate trade shall be permitted.

As was said in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255-256 (1938):

> "• • • local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed • • • with equal right by every state which the commerce touches, merely because interstate commerce

> is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. • • • The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

Whether the tax in the case at bar be regarded as a tax upon the receipts from sales (as by the exact terms of the City Law it is) or as merely *measured* by the receipts, the deterrent effect upon commerce is identical and the constitutional limitation equally necessary.

The case at bar would seem to fall clearly within the principles and reasoning underlying the decision in the recent case of *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), where at page 439 it is stated:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. • • • Such multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden de-

pends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

If the City of New York is to be permitted to impose a tax upon or measured by the gross receipts from an interstate transaction upon the theory that transfer of title or possession takes place within its borders, the State of New Jersey should with equal right be permitted to impose a tax upon or measured by the identical receipts upon the ground that another essential component part (for example, delivery to the interstate carrier) of the interstate transaction takes place within its borders. In this case the State of New Jersey having jurisdiction over the oil could but for the constitutional protection easily enforce such a tax. A tax upon any component part of an interstate transaction is just as much a burden upon interstate commerce as a tax upon any other part. No one component part can be singled out as subject to tax without opening the door to a cumulative tax burden.

POINT II

Comments on arguments in Petitioner's brief.

Preliminary Note

Petitioner having made his brief in the *Berwind-White* case his main brief and incorporated it by reference in his brief in the case at bar, we have addressed ourselves

principally to his main brief and our page references in this Point II are to the *Berwind-White* brief.

A.

As To Point II In Petitioner's Brief

It will, we think, make for clarity and simplicity in replying to Petitioner's arguments if we deal first with his novel suggestion (raised for the first time in his application for reargument before the Court of Appeals) that the sales tax here involved is "factually • • • identical" with the California use tax and that the sale here involved would, if it had taken place in California, have been subject to the California use tax.

In his brief and argument before the Court of Appeals Petitioner rested his case primarily upon a supposed identity between the facts of the case at bar and the case of *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169 (1935), Point II C of his brief reading: "*The* Wiloil, Banker Bros. *and* McNeel Marble *cases are squarely in point.*" (*Banker Bros.* v. *Pennsylvania*, 222 U. S. 210 [1911]; *McNeel Marble Co.* v. *Graves*, 247 App. Div. 242, aff'd 275 N. Y. 601 [1937].)

The Court of Appeals, however, as noted in Point I of our brief, found as a fact that in the case at bar the Respondent's contract was for specific oil stored in New Jersey and therefore necessarily involved transportation across the State boundary. That finding, of course, disclosed a clear distinction between the case at bar and the three cases just cited[1] and led the Petitioner to seek a

[1] The case of *Graybar Electric Co.* v. *Curry*, 308 U. S. (November 6, 1939), cited at page 22 of Petitioner's brief is, of course, distinguishable upon the same grounds as are the *Banker Bros.* and *Wiloil* cases (*supra*), upon the authority of which it was expressly affirmed.

new anchorage for his arguments. He therefore turned to the recently decided cases of *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939); and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939) (involving use taxes) and asserted in his brief annexed to his petition (p. 17) that "The New York City sales tax is, moreover, *identical* in substance with the California tax • • • sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra,* as the following tabular comparison plainly shows:" He then set forth a tabular comparison identical with that now appearing on page 20 of his brief *except for one very significant item.* The table in his former brief concluded with the following now omitted item of supposed identity:

"California Tax.	"New York City Tax.
7. The tax is on a local event, *i. e.*, 'the exercise of right or power • • • incident to the ownership of that property other than resale."	7. The tax is on a local event, *i. e.*, the 'transfer of title or possession or both, for any purpose other than resale.'"

Of course this omitted item of comparison is the key to the whole distinction between the California use tax and the sales tax in the case at bar, and the key to the decisions in the *Southern Pacific* and the *Felt & Tarrant* cases, *supra.* Petitioner quotes from the *Southern Pacific Co.* v. *Gallagher* case this Court's words:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon a choice of the thing taxed." (Italics Petitioner's.)

We respectfully submit that the words italicized should have been "*but upon a choice of the thing taxed.*" The "choice of the thing taxed" in the California statute is

not identical with that taxed under the New York sales tax. As set forth in the omitted item of Petitioner's tabular comparison, the California tax is on the exercise of any right or power over tangible personal property *incident to the ownership of that property.* The taxable event must therefore necessarily follow *after* the acquisition of ownership. The New York tax, *per contra*, is upon the transfer of title or possession,—a taxable event which must necessarily *precede* ownership.

At page 21 of his brief Petitioner makes the extraordinary statement:

> "In *Southern Pacific Co.* v. *Gallagher, supra*, the Court upheld the California tax as applied to the *sale and delivery of goods to the purchaser across State lines*, even though the goods were consumed in interstate commerce immediately after their receipt by the purchaser. In short, the tax was imposed upon the transfer of the property to the railroad company in California. The New York City sales tax is imposed upon precisely the same event—the transfer of the coal to the purchasers in New York City." (Italics ours.)

Petitioner has completely misread the *Southern Pacific* case. The railroad company did not acquire either title to or possession of the property in California. The property was acquired by the railroad company in other States and brought into California on its own way bills. This Court found, of course, that the taxable event was the "use" of the property in California by the railroad company during a "taxable moment" after its transportation had ceased and before its installation as an instrument of new interstate commerce had begun.

The Petitioner's argument that a tax upon a use is factually identical with a tax upon "the sale and delivery of goods to the purchaser across State lines" was expressly rejected by this Court in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, Mr. Justice CARDOZO saying at page 587:

> "Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought *does not make the tax upon the use a tax upon the sale.*" (Italics ours.)

In *Felt & Tarrant Mfg. Co.* v. *Gallagher* (*supra*), so strongly relied upon by Petitioner, this Court rested its decision solidly upon the *Silas Mason* case, quoting (p. 67) from it the following language:

> "'The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> 'Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, *when they have become part of the common mass of property within the state of destination.* • • • This is so, indeed, though they are still in the original packages. • • • For like reasons they may be subjected, *when once they are at rest*, to a non-discriminatory tax upon use or enjoyment. • • • A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common

that its validity has been withdrawn from the arena of debate.'" (Italics ours.)

In the instant case the oil never did become a part of the common mass of property in the State, nor was there even a taxable moment between the end of interstate transportation and the commencement of use in foreign commerce. There never was an intrastate taxable event. This has been found as a fact by the Appellate Division:

> "* * * there was no break in transit. * * * The oil was immediately * * * pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Ayer & Lord Co.* v. *Kentucky*, 202 U. S. 409; *People ex rel. Astor Trust Co.* v. *State Tax Commission*, 174 App. Div. 320, 324.)"

The foregoing demonstrates to a mathematical certainty the complete lack of foundation for Petitioner's statement on page 23 of his brief that "Upon that analysis it is clear that *this* taxpayer could be compelled to pay *this* tax upon *these very transactions*, had they taken place in California, under the California use tax statute."

That an attempt to designate as a *use* tax the imposition of the New York sales tax on the "delivery of goods to the purchaser across State lines" (Petitioner's brief, p. 21) would be invalidated by this Court is indicated with crystal clarity by Mr. Justice Cardozo at page 583 of the *Silas Mason* case (*supra*), where he says:

> "* * * a tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself."

One more comment seems pertinent as to this Point II of Petitioner's brief: If Petitioner is correct in his contention that the sales tax is identical with the California use tax, he is completely out of court. The New York City Personal Property tax, which supplements its sales tax here involved, has been held to be a "use" tax. See *Williamsburgh Power Plant Corp.* v. *City of New York*, 255 App. Div. 214 (2nd Dept. 1938); affirmed without opinion, 280 N. Y. 551 (1939).

The Appellate Division held in the case at bar that the oil was not subject to the New York City Personal Property tax, stating at page 240 of 254 App. Div. (R. 297):

> "Finding as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the Personal Tax Law also did not apply. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *Minnesota* v. *Blasius*, *supra*, p. 10.)"

The Petitioner took no appeal from this determination and argued in the Court of Appeals only that the oil was subject to the sales tax. He has acquiesced in the lower Court's determination that the oil is not subject to a use tax and is bound thereby. If, therefore, the sales tax is, as Petitioner contends, a use tax, there remains no question for determination by this Court.

B.

As To Point I In Petitioner's Brief

As to the introductory paragraph of and Subdivision A (p. 14) of Point I in Petitioner's Brief, we think it

sufficient to point out that the fundamental test of constitutionality in the cases so far decided by this Court has been, as we see it, the question whether the burden imposed by the State tax under consideration on commerce was direct or remote.

In the case of *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290 (1922), cited and relied upon by Petitioner at this point in his Brief, this Court put the matter in a nut-shell, saying, at page 294:

> "• • • The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

As to Subdivision B (p. 16) of Point I of Petitioner's Brief, Petitioner tries to picture the situation in the case at bar as one in which a purely local market, fenced about like the market-places of the Middle Ages, is involved. The fact is, of course, that we are here dealing with a case where the buyer *did* want particular goods from another State; did not intend to use and never did use the goods within the City; ordered the goods delivered to foreign ships having no situs in the City,—all as a part of continuous transactions in interstate and foreign commerce, the goods never (as the Courts below have found) coming to rest in the City. These goods never, in any real sense, came inside the fence surrounding this supposed market-place of "centuries ago". This is more like the levying of tribute by an Arab chieftain on a passing caravan than it is like a marketing tax on

merchants trading in goods brought inside a fenced-in market-place.

C.

As To Point III In Petitioner's Brief

We agree with the Petitioner that the discussion of the problems here involved in the recent cases cited on page 40 of his brief is more important than the historical review to which he devotes pages 24-39. We note that in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938) this Court stated that on the particular facts of that case "So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the *doctrine that gross receipts from interstate commerce may not be made the measure of the tax.*" (Italics ours.) But where, as in *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938) and *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939) the tax was "measured by the entire volume of the interstate commerce in which appellant participates," the doctrine that gross receipts may not be made the measure of the tax was applied. And it was emphasized that "the generality and nondiscriminatory character of the exaction • • • will not save the tax if it directly burdens interstate commerce" (p. 312, Adams opinion).

Petitioner persists in ignoring the fact that by definition within the law itself the City Sales Tax Law is a tax on gross receipts and is "measured by the entire volume of the interstate commerce in which" Respondent "par-

ticipates". Section 2 reads: "Imposition of tax * * * There shall be paid a tax upon *the amount of the receipts from every sale* in the City of New York as follow: * * *." (Italics ours.) Payment is to be made by the purchaser to the vendor, *in default of which the vendor must himself pay.* The fundamental fact cannot be escaped that the tax is on the transaction of interstate transportation and sale and that it is measured by a percentage of the very proceeds of sale.

That such a tax is capable of being exacted in more than one State is obvious, as we have already made clear in Point I of this Brief. It is a tax on "a transfer of title or possession" which, in the case at bar, was one and the same act in law and in fact as that delivery of the oil which was an integral part of an uninterrupted interstate transportation. There can be nothing "remote" or "attenuated" in the impact of such a gross receipts tax; and no basis for an exception to the rule that an unapportioned gross receipts tax measured by the entire interstate transaction in which both vendor and purchaser participate shall not be permitted. Such a tax, if permissible, could clearly be duplicated by a New Jersey tax on some other component part of the interstate transaction (as for example a tax imposed upon all deliveries to carriers for shipment, including intrastate as well as interstate shipments) also measured by the full amount of the gross receipts.

D.

As To Point IV In Petitioner's Brief

Petitioner argues (p. 46 of his brief) that the tax in question is upon a purchaser-consumer and therefore cannot be a tax upon interstate commerce because "the

purchaser for consumption is not engaged in interstate commerce." We can see no possible merit in such a contention. Commerce is *inter*course. There must be more than one party to *inter*course. "Commerce", said this Court in *The State Freight Tax*, 15 Wall. 232 (1872) at page 275, "consists in selling the superfluity, *in purchasing articles of necessity*, as well as * * *." (Italics ours.) The Respondent here was most certainly "purchasing articles of necessity" for use in carrying on foreign commerce.

The sales tax is, of course, a tax upon the sale, not upon the "purchaser-consumer". It is upon an interstate transaction and whether it is the vendor or the purchaser who pays it is immaterial.

In *Brown* v. *Maryland*, 12 Wheat. 419 (1827) at page 442, Chief Justice MARSHALL disposed of the contention that the tax there involved was "not a tax upon the article, but upon the person" by saying "this is varying the form, without varying the substance."

In *Eastern Air Transport* v. *Tax Commission*, 285 U. S. 147 (1932) at page 152 this Court said:

> "Undoubtedly, *purchases* of goods within a State, may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity." (Italics ours.)

Again in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218 (1928) at page 222:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests."

So here, the tax is, by definition, levied on the gross receipts from the transfer of title or possession; and it is by this transaction that the tax is measured and on which the burden rests. Compare the comment of Mr. Justice Stone in the *Western Live Stock* case (*supra*) at page 260, "If broadcasting could be taxed, so also could reception." So here: if delivery could be taxed so also could shipment.

E.

As To Point V In Petitioner's Brief

Very little comment seems required as to this Point. Petitioner suggests that to invalidate this tax would enable local *merchants* to keep their goods in warehouses across the Hudson River and put up a sign stating "Buy Here and Avoid the Sales Tax."

No honest merchant could do that unless he added "But Pay the Personal Property Tax." For although the fuel oil in the case at bar, on the peculiar facts of this case, was exempt also from the "use" tax, the proper enforcement of the "use" tax and the sales tax taken together will, we submit, tap a sufficiently copious source of revenue without resorting to the breaking down of the proper constitutional safeguards covering situations such as those in the case at bar.

F.

As To The Particular Brief In The Case At Bar

The discussion of the points immediately preceding has been directed to the corresponding points in the petitioner's brief in the *Berwind-White* case as indi-

cated at pages 19-20, *supra*. With reference to the brief filed in the case at bar it seems unnecessary to add further comment except to call attention to the emphasis placed at page 9 thereof upon the concession made by the Respondent that it was taxable with reference to deliveries made from storage tanks within the City of New York. In the Appellate Division Respondent conceded that a sale tax of $292.83 be paid on the two emergency deliveries of oil borrowed by the Standard Oil Company. As stated by the Respondent in its brief in the Appellate Division: "This concession is made because of the small amount of tax involved in these items, since we understand that the question of taxability of local deliveries of bonded oil is now being litigated in a case [*Gulf Oil Corporation*, No. 473] where the total tax involved is many times the tax on these two items."

The opinion of the Appellate Division, recognizing the limited purpose of the concession made by Respondent (petitioner in that Court) stated:

> "As to the emergency deliveries originating at Staten Island, the petitioner concedes for the purpose of this case only that the sales tax of $292.83 should apply. Because of this concession the determination under review with respect to such amount of tax will be confirmed. By such confirmation, however, we are expressing no opinion respecting the taxability of such sales" (R. 296-297).

It is therefore readily apparent that in making the aforesaid concession Respondent waived none of its arguments as to any of the other deliveries in question.

POINT III

The fuel oil is not subject to the New York City Sales Tax because at all times it retained its distinctive character as an import under the protection of Article 1, Section 10, Clause 2 of the Constitution of the United States as well as that of the Commerce Clause; it never acquired a situs within the City of New York or became a part of the mass of property within the City.

All of the fuel oil involved in this case was either bonded or drawback oil. In addition there was diesel oil (constituting less than 5% of the total; Exh. 27, R. 257, 148) most of which was drawback oil although some small part was of domestic origin (R. 196).

A.

As to the Bonded Oil

The greater part of the oil in question was bonded oil (R. 196). This oil was fuel oil imported in a refined state, requiring and being subjected to no processing whatsoever in the United States (R. 188). This refined oil, originating in Venezuela, was pumped directly from the importing vessels, without the payment of import duties, into bonded tanks of the seller in New Jersey supervised by a United States customs storekeeper, where it was kept separate from any other property of the seller; from these tanks it was pumped into barges sealed by Government inspectors and thence transported to ship's side in New York and pumped, under customs supervision, into Respondent's vessels (which had no situs in the City of New York) on the eve of their sailing for foreign ports (R. 191, 121). Not until the oil was so pumped into the vessels was release from bond given.

On these facts, which are not disputed, it seems impossible to contend that this oil, sold in its original refined state exactly as imported, lost its distinctive character as an import or became commingled with the general mass of property of the State or City. As stated earlier in this brief, its contact with the periphery of the City was purely tangential. Under such conditions we believe the law to be clear that neither the State nor the City could tax the oil or its sale, directly or indirectly. We are dealing here not only with the question of a burden upon foreign commerce but with a positive constitutional prohibition against anything which is the equivalent of a duty or an impost upon imports.

The leading case, of course, applicable to the situation is *Brown* v. *Maryland*, 12 Wheat. 419 (1827), in which the State of Maryland sought to impose a license tax on all importers of foreign articles or commodities. The indictment was "against the importer, for selling a package of drygoods in the form in which it was imported, without a license". The opinion of the Court was delivered by Chief Justice MARSHALL, who held such a tax repugnant not only to the constitutional prohibition against imposts on imports, but also to the Commerce Clause. Taking up first the prohibition against State taxes on imports he held that it would be a nullity if it permitted a tax upon the goods, upon their sale, or upon the privilege of selling them prior to the time they had become commingled with the general mass of property in the State. On the contention that the tax was merely a tax on a person, not the thing imported, the Chief Justice commented (p. 444):

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general;

> as if it were confined to a particular mode of doing the forbidden thing. *All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.* • • • So, a tax on the occupation of an importer is, in like manner, a tax on importation. *It must add to the price of the article, and be paid by the consumer, or* by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution." (Italics ours.)

It would seem obvious that a tax on the privilege of buying (which appears to be the Petitioner's conception of the nature of the tax in the case at bar), paid by the consumer, would have been just another case of "varying the form, without varying the substance" and equally invalid.

Taking up next the applicability of the Commerce Clause, the Chief Justice said (pp. 446-447):

> "Commerce is intercourse — one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. • • • Any charge on the introduction and incorporation of the articles into and with the mass of prop-

erty in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of the regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation".

The case of *Brown* v. *Maryland* has been consistently followed to this day. As was said by this Court in *Norfolk & Western Railway Co.* v. *Sims*, 191 U. S. 441, 449 (1903):

"• • • for the past seventy-five years and ever since the original case of *Brown* v. *Maryland*, 12 Wheat. 419, we have uniformly held that States have no power to tax directly or by license upon the importer, goods imported from foreign countries or other States, while in their original packages, *or before they have become commingled with the general property of the State and lost their distinctive character as imports.* • • • The case is one of the most important ever decided by this Court, and has been adhered to by a uniform series of decisions since that time". (Italics ours.)

See also *Anglo-Chilean Corp.* v. *Alabama*, 288 U. S. 218 (1933), which held invalid a franchise tax on an importer landing and selling nitrates in their original form, this Court pointedly saying (p. 225):

"The question whether, consistently with the imports and commerce clauses, the Alabama statute may be construed to require appellant to pay the specified franchise tax is dual in form but single in substance, for, upon the facts of this case, it is clear that if the exaction is a tax on imports it necessarily burdens foreign commerce".

And see, in addition, *Cook* v. *Pennsylvania*, 97 U. S. 566, 573 (1878).

In *Brown* v. *Maryland (supra)* the Chief Justice, in discussing the particular facts of that case, said (pp. 441-442):

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form *or* package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution". (Italics ours.)

It seems to us that the facts in the case at bar are, as to the bonded oil at any rate, in every essential particular identical with those in *Brown* v. *Maryland* except for the added consideration that under the facts in the case at bar Governmental seals and supervision rendered *impossible* the commingling with the mass of property in the country. This refined oil was kept absolutely "in the *original form* or package *in which it was imported*" and was delivered in that condition direct into the bunkers of Respondent's vessels, remaining the property of the importer right up to the instant of delivery.

B.

As to the Drawback Oil

The drawback oil is crude oil imported from South America, upon which the duty is paid, the oil being refined at the seller's plants in New Jersey, and upon delivery of the refined oil to Respondent's steamships, the duty being refunded (R. 189). Except for the fact that

the oil is processed after instead of prior to importation, and the duty conditionally paid, instead of not being paid at all, the facts as to this drawback oil in the case at bar are identical with those set forth, *supra*, as to the bonded oil. It is at all times refined, stored, delivered and sold under Government supervision and is never permitted, as a fact, to become commingled even with other oil owned by the importer which is free from these restrictions or commingled with the bonded refined oil referred to under A, *supra* (R. 193-194).

As to the immunity of oil that enters the United States in a crude state and is thereafter refined or processed before sale the Petitioner will doubtless argue that the case of *Gulf Fisheries Co.* v. *MacInerney*, 276 U. S. 124 (1928), prevents the application of the principles laid down in *Brown* v. *Maryland*. (The case can, of course, have no application to the refined bonded oil.) In that case a tax measured by the weight of certain fish sold by the plaintiff was held not a tax on imports because (without deciding whether fish taken from the sea were imports) the Court held "On the facts agreed, the tax is not paid until the fish have lost their alleged distinctive character as imports, and have become, through processing, handling and sale, a part of the mass of property subject to taxation by the State" (p. 126). The fish in question were treated in various ways, some sold locally, others interstate, none, however, being kept carefully segregated, as was the oil in the case at bar, *earmarked for shipment out of the country* so as to enable the importer to "draw back" import duties conditionally paid.

We think it clear that the retention by the importer of imported goods in their original imported state is only

one of the tests by which may be determined the really critical question whether the goods have become commingled with the general mass of property within the State. Where they are processed, as were the fish, and there is no other factor which prevents the commingling, the tax can be upheld; but the United States Government itself in the case at bar took great care to see that this oil was not commingled and therefore we believe that the real *ratio decidendi* of *Brown* v. *Maryland* justifies immunity for this oil.

We wish to make it clear that we do not argue that the fact that property is in a bonded warehouse necessarily protects it from tax. Domestically manufactured products placed in bonded internal revenue warehouses are not *ipso facto* immune (*Carstairs* v. *Cochran*, 193 U. S. 10 [1904]). But we do contend that the handling of this oil under Government control was such that it was never permitted to be commingled with the general mass of property and that it therefore left the country without losing its distinctive character as an import. Had any circumstance permitted it to become commingled, the Government would have refused to permit the draw back of the import duties.

In commenting on the different treatment of property sold in its original form or package in cases concerned simply with interstate commerce as contrasted with those involving imports, Chief Justice TAFT, in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 510 (1923), said:

> "The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce".

The oil in the case at bar, therefore, having retained throughout its character as an import, is immune irrespective of the question whether or not the tax is a burden on interstate commerce. As stated in *Low* v. *Austin*, 13 Wall, 29, 34 (1871):

> "Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax."

Only one comment seems necessary upon the Petitioner's argument on this import point. At pages 19 and 20 of his brief in the *Gulf Oil Corporation* case (No. 473) Petitioner sums up his argument on the point with the following statement:

> "The features of the instant tax which become significant in the light of the foregoing cases are these:
>
> (1) *it is imposed after the importer has parted with control;*
>
> (2) it is imposed not on the importer but on the purchaser.
>
> Clearly, then, the tax is not within the condemnation of any case decided by this Court, and is perfectly valid." (Italics ours.)

The italicized statement is not true and is in direct conflict with petitioner's own description of the tax as on "the transfer of the title or possession, or both"; see page 21 above. The tax is not imposed *after* the importer has parted with control; it is imposed on the *parting* with such such control by the importer.

POINT IV

The proposed imposition of the City Sales Tax on the transfer of title and possession of the fuel oil at the moment of its discharge into the bunkers of Respondent's foreign flag vessels engaged in the carriage of passengers and merchandise to foreign ports would violate Article 1, Section 10, Clause 2 of the Constitution of the United States prohibiting State taxation of exports.

A.

The Proposed Taxation of the Fuel Oil Would Constitute Taxation of the Process of Exporting the Merchandise Carried in Respondent's Vessels

The consumption of the fuel oil by Respondent's vessels is an absolute *sine qua non* of the exporting process in which those vessels were regularly engaged. It was sold and delivered solely for that purpose.

A Federal tax upon "the vellum, parchment or paper upon which" a bill of lading was written was held invalid in *Fairbanks* v. *United States,* 181 U. S. 283, 293 (1901), the Court saying that the freedom of exports from tax or duty

> "* * * requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation, and, as we have shown, a stamp tax on a bill of lading, which evidences the export is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export".

Similarly as to a Federal stamp tax on a charter party for the carriage of cargo from United States to foreign ports (*United States* v. *Hvoslef*, 237 U. S. 1 [1915]); a Federal stamp tax on ships' export manifests (*New York & Cuba Mail Steamship Co.* v. *United States*, 125 Fed. 320 (D. N. Y., 1903); reversed on other grounds, 200 U. S. 488 [1906]); and a Federal stamp tax on insurance policies covering exports (*Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19 [1915]), this Court pointing out in the latter case (p. 27):

> "• • • the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, nor with distinct or separable subjects; the tax falls upon the exporting process."

The foregoing taxes were held to be prohibited under Article 1, Section 9, Clause 5 of the Constitution prohibiting the Federal Government from taxing "*Articles* exported from any State" (Italics ours) upon the ground that the constitutional prohibition covers not only a direct tax on *articles*, but any tax which burdens the exporting process. The prohibition against the States set forth in Article 1, Section 10, Clause 2 of the Constitution is broader in its language,—in terms forbidding "Imposts or Duties on Imports or Exports" rather than simply upon "Articles exported", and the constitutional immunity from State taxation of exports is, therefore, if anything broader than the immunity from Federal taxation.

If bills of lading, manifests and insurance policies are a part of the exportation process and therefore not to be

taxed, *a fortiori* the fuel necessarily consumed in the process of exportation should be exempt.

It will be urged by the Petitioner that the cases of *Eastern Air Transport* v. *Tax Commission*, 285 U. S. 147 (1932) and *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939) show that a tax upon this fuel oil is not to be invalidated as an alleged burden on foreign commerce. Those cases dealt only with alleged burdens on interstate commerce. They dealt only with an alleged infringement upon the exclusive right of Congress to regulate commerce. They did not involve, as does the case at bar, the violation of a *positive constitutional prohibition* which (as interpreted by this Court in the *Hvoslef* and other cases cited *supra*) forbids any burden whatever on the process of exportation.

On page 38 *supra* of this Brief we quoted Chief Justice TAFT's language emphasizing that the problem of whether a tax is a burden on interstate commerce or not is not to be confused with the problem of the extent of immunity *granted to the process of importation* arising from Article 1, Section 10, Clause 2 of the Constitution. We think it equally clear that the problem involved in cases holding that taxes upon the intrastate use of car wheels or sale of gasoline destined to be used in interstate commerce do not unconstitutionally burden that commerce are not to be confused with the problem of the extent of the immunity *granted to the process of exportation* arising under that same Clause 2.

A positive constitutional prohibition against a tax which interferes with importation or exportation can very properly be held to constitute a shield of larger circum-

ference than that implied from the necessity of preventing interference with the exclusive power of Congress to regulate commerce.

At the port of New York some of the foreign steamship lines berth their vessels on the Jersey side of the Hudson, some on the New York side. It seems incongruous that those on the Jersey side should be free of this proposed burden on their exportation of merchandise while those on the New York side should pay tribute.

B.

The Deliveries of Fuel Oil in Question Are, Themselves, "Exports" Within the Meaning of Article 1, Section 10, Clause 2 of the Constitution

We believe that the case at bar presents also the proper occasion for this Court to pass for the first time upon the question whether fuel oil supplied to foreign vessels for consumption on the high seas on direct voyages to foreign ports are "exports" within the meaning and intent of the Constitution.

In *Swan & Finch Co.* v. *United States*, 190 U. S. 143 (1903), this Court held, in interpreting the drawback statute in its then form, that the word "exportation" did not include supplies furnished to foreign trade vessels consumed at sea, saying in that connection (p. 145): "Another country or State as the intended destination of the goods is essential to the idea of exportation". The Court was construing not the Constitution but the words of the statute granting a privilege and under well known rules of construction construing the words strictly.

In contrast, this Court in *United States* v. *Chavez*, 228 U. S. 525 (1913), decided ten years later, in construing

another statute making criminal the "export" of certain articles held that within the meaning of that statute the crime was complete upon shipment and that no allegation that the goods were landed in a foreign country was necessary. Here again no question of constitutional interpretation was actually involved. By way of dicta the Court commented (pp. 529-530):

> "In common speech the shipment of goods from this to a foreign country without regard to their landing in such country is often spoken of as an export. It is true also that for the purposes of the provisions of § 9, Article I, of the Constitution, prohibiting the laying by Congress of a tax or duty 'on articles exported from any State' and of § 10, Article I, forbidding any State, without the consent of Congress, to 'lay any imposts or duties on imports or exports,' a shipment is considered as the initiation of export so as to bring the goods shipped within the protection of the constitutional safeguards. *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 181 U. S. 283. Despite, however, the significance given to the words to export in these cases, it is nevertheless certain, as stated by the court below, that by a practically unanimous concensus of opinion, accurately speaking, exportation in the complete sense consists of two essential ingredients—the sending of merchandise from this to a foreign country and its landing in such country. But the question which we are called upon to solve, that is, the meaning of the words 'to export' as used in the joint resolution, may not be disposed of by any mere abstract consideration of the meaning of the words, but their signification must be determined with reference to the text of the resolution itself."

Neither of these cases had occasion to go to the root of the question as to the purpose and intent of the constitu-

tional prohibition against levies on exports. As Chief Justice MARSHALL said in *Brown* v. *Maryland (supra)*, in discussing "imports" under this Clause 2, at page 438:

> "If we quit this narrow view of the subject, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation."

We believe that the fundamental object of the prohibition against levies on exports was that each State of the Union should have free opportunity to market its products *outside the boundaries of the United States.* We can see no reason for assuming that the protection of this external market was to be limited to products landed on a foreign shore. This Court can well take judicial cognizance of the fact that when the Constitution was adopted a not inconsiderable volume of products must have been consumed in supplying to ships under foreign flags the stores needed for consumption at sea. When British sailing ships took off from New York to India they required supplies to last months. What basis can there be for supposing that it was intended to permit New York, for instance, to levy tribute on the business of supplying ship's stores to vessels leaving its port for foreign shores although New York was forbidden to do so as to their cargoes? Passing to the situation as it exists today; if one interior State produces oil or coal primarily suited to consumption as bunkers and with little or no market on foreign soil, is it to be shut out of its exterior market, unless it pay tribute to a seaboard State because the oil or coal is never landed abroad, while its neighbor interior State producing fuel much in demand for consumption within foreign countries is to be free of this tribute?

In the Clause of the Constitution here under consideration the prohibition is against imposts on "Imports or Exports". This close juxtaposition of the two terms makes judicial holdings as to the meaning of "Imports" as applied to articles brought from the high seas, or applied to ship's supplies consumed on board, pertinent, by analogy, as to the proper meaning to be given the word "Exports" in converse situations.

In *Procter & Gamble Mfg. Co.* v. *United States*, 19 U. S. C. C. P. A. 415 (certiorari denied 287 U. S. 629 [1932]), whale oil manufactured at sea on a foreign factory ship when brought into the United States was held to be "imported" although the statute involved referred to articles "imported *from any foreign country*". (Italics ours.)

In *United States* v. *Gully*, 9 F. (2d) 959 (S. D. N. Y. 1922), the Court said:

> "I interpret the words, 'import' and 'bring into', as meaning any carriage of goods from outside the United States within its borders, and in the absence of any authority to the contrary I do not hesitate to define those words in that sense. • • • I have no doubt whatever that, if a ship lies off the four-league limit, and a small boat comes out and takes liquor from her, and carries it into the United States, the small boat has imported the liquor within the United States."

To the same effect *Perry* v. *United States*, 39 F. (2d) 52 (C. C. A. 5, 1930), and *Awalt* v. *United States*, 47 F. (2d) 477 (C. C. A. 3, 1931), decisions by the Circuit Courts of Appeals of the Fifth and Third Circuits, respectively.

In *Booth Fisheries Corp.* v. *Case*, 182 Wash. 392 (1935), the Court invalidated a State "catch tax" on salmon caught on the high seas as a levy on imports, the Court holding "That fish caught in the Pacific Ocean beyond the territorial limits of the State are imports, when brought into the State, is not open to question."

In *Gulf Fisheries Co.* v. *Darrouzet*, 17 F. (2d) 374 (D. Tex. 1926) (affirmed *sub nom. Gulf Fisheries* v. *McInerney*, 276 U. S. 124 (1928), discussed *supra* at p. 37 of this Brief) the Court said as to fish caught on the high seas and brought into Galveston (at p. 376):

> "Considering these contentions in their order, we think as to the first contention it is sufficient to say that the Constitution prohibits taxes on imports, that these fish certainly are imports (that is, objects or things brought into the United States), and that whether they are articles of commerce in the ordinary sense is wholly immaterial. The word 'import', used in statutes, has been given the broadest construction. See *United States* v. *Sischo*, 262 U. S. 165, 43 S. Ct. 511, 67 L. Ed. 925."

This Court held on appeal in the above case that it had "no occasion to enquire whether the fish are imports" (p. 126) because they had, when taxed, become part of the common mass of property in the country.

And although ship's stores remaining on a ship after her arrival in port, are not dutiable as imports, because they never become commingled with the mass of property in the country, (cf. *The Conqueror*, 166 U. S. 110 [1897]), wines brought in as ship's stores from abroad for consumption by the crew on board while in port were held to be within the provisions of the Eighteenth Amendment prohibiting the "importation" of intoxicating

liquors for beverage purposes. *Cunard Steamship Co., Ltd.* v. *Mellon*, 262 U. S. 100 (1923). In that case this Court stated, at pages 121 and 122:

> "Some of the contentions ascribe a technical meaning to the words 'transportation' and 'importation'. We think they are to be taken in their *ordinary* sense, for it better comports with the object to be attained. • • • Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act." (Italics ours.)

The underlying basis of interpretation running through the foregoing cases appears to be that "import" and "importation" are words to be taken in their ordinary sense of bringing into the territorial jurisdiction of the United States and "exports" or "exportation" are to be taken in their ordinary sense of taking out of the territorial jurisdiction of the United States without intent to return, unless, in either case, the *purpose* of the statutory law or of the constitutional provision applicable compelled a different conclusion.

The purpose of the constitutional prohibition against State levies on exports certainly does not compel a contrary conclusion. This purpose as we have stated above was, we submit, to safeguard the markets of the several States for their products for consumption outside the boundaries of the United States. There was no more justification for permitting levying of tribute by the State within which lay the port of exit in the case of goods to be consumed on the high seas by foreign ships than in the case of goods to be consumed on foreign shores.

POINT V

Respondent is entitled on the present record to have this Court sustain the judgment of the Court below, if necessary, upon the grounds set forth in Points III and IV, *supra*.

Lest it now be argued that since the Court of Appeals was silent on the two points last raised in this brief (which were not argued before it although advanced in briefs before the Appellate Division) this Court may not properly consider them, Respondent begs leave to point out:

The trial was an administrative proceeding. Having proved all necessary facts, Respondent by its counsel at the close of the hearing made a formal statement claiming violation of Respondent's constitutional rights both under the Commerce Clause and under the clause prohibiting state taxation of exports (R. 227). In its petition to the Supreme Court of the State of New York Respondent specifically claimed a violation of Article I, Section 10, Clause 2 of the Constitution (R. 8). The Appellate Division of the Supreme Court having found the tax invalid as a violation of the Commerce Clause did not discuss the export-import points although both these points were advanced in the briefs before it. In the Court of Appeals and in opposing the petition for a writ of certiorari Respondent was defending the orders already made. Furthermore, by advancing one argument on the preliminary question whether a writ should be granted Respondent waived none of the other arguments previously made.

The right of a respondent to raise additional points to sustain the judgment* was succinctly described by this Court in *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937):

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208; *United States* v. *American Ry. Express Co.*, 265 U. S. 425; *United States* v. *Holt State Bank*, 270 U. S. 49, 56; *Langnes* v. *Green*, 282 U. S. 531; *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 239; *cf. United States* v. *Williams*, 278 U. S. 255."

See also *Langnes* v. *Green*, 282 U. S. 531, 538 (1931):

> "Respondent here defends that decree [of the court below] upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge, * * *."

See also *United States* v. *American Railway Express Co.*, 265 U. S. 425 (1924) in which this Court said at page 435 that it is

> "settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or of insistence upon matter overlooked or ignored by it."

---

* Affirmance by this Court *solely* on the ground that the tax is invalid as a tax upon an import may require the remanding of the case to determine what part of the Diesel oil (representing less than 5% of the total) was produced from domestic crude oil; see page 32, *supra*.

True, this Court has at times restricted the scope of inquiry in the argument before it* but such opinions announce nothing more than "a rule of practice." *Langnes* v. *Green*, 282 U. S. 531, 538 (1931). Of course the *power* to consider all questions exists (*ibid.*). It may be that at times this Court has remanded a case to the Court below for consideration of a point not previously raised there; *e. g.*, *Zellerbach Co.* v. *Helvering*, 293 U. S. 172 (1934); *cf. Clifton Mfg. Co.* v. *United States*, 293 U. S. 186, 188 (1934). No useful purpose, however, would be served by remanding the case at bar to the Court of Appeals for consideration of the points urged in Point III and Point IV of this brief, because that Court, in the contemporaneously argued case of *McGoldrick* v. *Gulf Oil Corporation* (No. 473) indicated clearly that its holding on these points would have been in favor of the Respondent in the case at bar.

---

* For example, this Court has refused to permit a petitioner to argue any error other than that set forth in his petition, *Clark* v. *Williard*, 294 U. S. 211 (1935); *Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587 (1936); *Commercial Credit Co.* v. *United States*, 276 U. S. 226 (1928); or to permit a respondent who failed to file a petition to claim that the judgment below was in any respect erroneous; *Federal Trade Com.* v. *Pacific Paper Assn.*, 273 U. S. 52 (1927); *Alexander* v. *Cosden Co.*, 290 U. S. 484 (1934). This Court, of course, will find nothing binding or even persuasive in these decisions.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed; but in the event of (1) an adverse decision upon the Federal question forming the basis of the decision of the Court of Appeals coupled with (2) a refusal by this Court to consider the Federal questions briefed in Points III and IV *supra*, the case should be remanded to the New York Court of Appeals for consideration of these latter questions.

Dated, New York, N. Y., December 29, 1939.

Respectfully submitted,

HAROLD S. DEMING,
Counsel for Respondent,
80 Broad Street,
New York, N. Y.

DONALD HAVENS,
BERNARD D. ATWOOD,
Of Counsel.

APPENDIX

New York City Personal Property Tax

For the year 1935, No. 25 of 1934, as amended by No. 13 of 1935.

Sec. 1. Imposition of Tax. During the period commencing on January first, nineteen hundred and thirty-five, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid by the owner a tax of two per centum upon the value of the following-named *articles of personal property situated or owned within the City of New York:*

* * * *

(k) Oil, gas, gasoline and other combustibles.

Sec. 2. Exemptions. No tax, as imposed by Section one of this title shall be due or payable in any event upon any of the articles enumerated in the said section one, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the Comptroller.

* * * *

(c) That the said article is one *upon the receipt from the sale of which a tax has been paid* pursuant to the provisions of this law or local law number twenty of nineteen hundred and thirty-four, as amended. [The City "Sales Tax"] (Italics ours).

* * * *